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No. 84-1506

In The

Supreme Court of the United States

October Term, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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COUNTERSTATEMENT OF THE CASE

Petitioner, Airwork Service Division ("Airwork"), is seeking, by writ of *certiorari*, to have this Court review a decision by the Supreme Court of New Jersey sustaining an assessment imposed under the New Jersey Sales and Use Tax, *N.J.S.A.* 54:32B-1 *et seq.*, by the respondent, New Jersey Director of the Division of Taxation ("Director"). Airwork maintains that the decision sustained an unpublished change in the Director's policy which was retroactively applied against Airwork in violation of the Due Process Clause of the Fourteenth Amendment. This issue was not addressed by the Supreme Court of New Jersey because it was never raised below by Airwork and was raised for the first time before the Supreme Court of New Jersey by an *amicus curiae*, the American Civil Liberties Union.

Airwork is in the business of repairing plane engines for customers. Airwork conducted its repairing services solely in New Jersey for customers located throughout the country. At issue is the taxability of those receipts derived from repairing services performed on plane engines destined for delivery to out-of-state customers following the performance in New Jersey of the taxable services for the period August 12, 1971 to June 30, 1973. Airwork challenged the assessment before the Tax Court of New Jersey maintaining that the repairing services, performed on goods destined for out-of-state delivery, were not taxable under the literal language of the Sales Tax, that the assessment violated the Commerce Clause of the United States Constitution by burdening interstate commerce, that the assessment violated the Equal Protection Clause on the basis that the performance of

services in this state on goods destined for out-of-state delivery should be treated similarly to the sale of goods across state lines, that the assessment violated the Due Process Clause because New Jersey had insufficient nexus with the transaction to warrant the assessment and that the policy underlying the assessment should have been reflected in a regulation adopted pursuant to the New Jersey Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, as a condition for imposing the assessment.

The Tax Court heard this matter on crossmotions for summary judgment and upheld the assessment in a written decision dated March 27, 1981. *Airwork Service Division v. Director, Division of Taxation*, 2 *N.J. Tax* 329 (Tax Ct. 1981) (Supp. App. 3a). Airwork appealed the judgment to the New Jersey Superior Court, Appellate Division, which affirmed the trial court's holding. 4 *N.J. Tax* 532 (App. Div. 1982) (Supp. App. 21a). The Supreme Court of New Jersey granted Airwork's petition for certification and, in a decision dated July 23, 1984 (97 *N.J.* 290, 478 *A.*2d 729 (1984)) (App. 1a), held as follows:

> 1. As a matter of state law, the repairing services performed on plane engines in New Jersey are taxable services under the Sales Tax, notwithstanding that the engines were delivered to out-of-state customers following the performance of the services.
>
> 2. As a matter of state law, the Director was not equitably estopped from imposing the assessment merely because the taxes on such transactions were not imposed for earlier tax years.
>
> 3. As a matter of state law, the Director was not required to publish a regulation in accordance with the New Jersey Administrative Procedure Act, *N.J. S.A.* 52:14B-1 *et seq.* as a prerequisite to imposing

the assessment since the statutory standard clearly reflected the taxability of the repairing services.

4. As a matter of state law, the constitutional issue alleging a retroactive application of the sales tax in violation of the Due Process Clause was not properly before the Court since it was never raised by Airwork but rather was briefed for the first time by an *amicus* before the New Jersey Supreme Court.

Although Airwork contends that the assessment imposed against it was contrary to the official policy of the Division of Taxation as reflected in the Commerce Clearing House New Jersey State Tax publication ("CCH") and was thus retroactively imposed, there is no basis for that factual finding in the record. The affidavit of Vincent A. Carretta, who was the superintendent of audit and was responsible for coordinating the audit activities of the Division of Taxation, states that the Airwork assessment,

> . . . was imposed in accordance with the policy of the Division of Taxation of subjecting to the tax all taxable services performed within this State notwithstanding that the items serviced were delivered out of the State after the rendition of the taxable service. [Resp. App. *2a].

In addition, the affidavit of John Baldwin, the present Director of the Division of Taxation, similarly states that,

> . . . the policy of the Division of Taxation since the inception of the Sales and Use Tax Act in July of 1966 has been to tax all services subject to the sales tax performed within the State regardless of whether the products upon which such services are performed

---

* The designation "Resp. App." refers to the appendix attached to this brief submitted on behalf of the respondent, Director, Division of Taxation.

> are shipped out of the State subsequent to the performance of the taxable service. [Resp. App. 6a par. 9].

Mr. Baldwin consistently reiterated that position in his deposition, noting that the Division's policy was to tax the receipts from all taxable services performed in New Jersey notwithstanding the ultimate destination of the goods serviced. Mr. Baldwin noted that the instructions accompanying the sales tax returns issued in 1966 and thereafter stated that only taxable services performed *outside* of New Jersey were an exempt category, thus inferring that all taxable services performed in New Jersey were taxable (Resp. App. 24a). This instruction form was filed with the Secretary of State and, therefore, had the force and effect of a regulation (Resp. App. 25a). There is no evidence in the record to contradict the assertion that since 1966 the Division of Taxation has consistently taxed all taxable services performed in New Jersey regardless of the destination of the serviced goods.

Mr. Baldwin's affidavit further notes that the Sales Tax Act became effective April 27, 1966 but applied to transactions occurring after July 1, 1966 (Resp. App. 5a). Immediately following the effective date of the act but prior to the first date of its application, the Division of Taxation drafted a proposed official news release containing questions and answers about the act. One proposed question and answer contained in said draft was the following:

> Q. Is the labor charge for repair work done to a boat subject to tax where: (a) The boat docks in a

port outside New Jersey for repairs; (b) In connection with such repairs, parts are transferred from the boat to a repair shop located in New Jersey; (c) Pursuant to a contract, upon completion of the repair work the parts are delivered back to the boat outside New Jersey?

A. No. Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax. Under the facts set forth above, the labor charge would not be subject to the sales tax.

The draft of the proposed official news release was modified and the quoted question and answer deleted. The official news release that was published in June 1966, therefore, did not contain the question and answer involving repair services performed on a boat (Resp. App. 5a to Resp. App. 6a). Although the draft of the proposed news release was published by Commerce Clearing House in its New Jersey State Tax Reporter, this draft of the proposed news release containing the noted question and answer was neither officially published by the Division of Taxation nor filed with the New Jersey Secretary of State (Resp. App. 6a).

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ARGUMENT

The Supreme Court Of New Jersey Correctly Declined To Consider The Due Process Claim As A Matter Of State Law Since That Issue Was Never Raised Below By Airwork And Was Alleged For The First Time On Appeal By An Amicus Curiae Before The Supreme Court Of New Jersey.

The New Jersey Sales and Use Tax, *N.J.S.A.* 54:32B-1 *et seq.*, imposed a 5% levy for the assessment period in question on the receipts derived from the sale of tangible personal property and the performance of designated services. *N.J.S.A.* 54:32B-3. The Legislature enumerated as taxable services the ". . . maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business. . . ." *N.J.S.A.* 54:32B-3(b) (2). The applicable statute for the period in question made no distinction between taxable services performed on goods destined for out-of-state delivery or goods remaining in New Jersey and clearly taxed the servicing and repairing functions performed by Airwork in this state regardless of the eventual destination of the repaired aircraft engines.

Airwork maintains that it was a mere collector of the tax, that it properly relied on the information published in CCH in not collecting the tax and that the state is thereby prohibited from assessing an allegedly "retroactive" tax under the Due Process Clause. This issue of "unconstitutional unfairness" was never previously raised by Airwork and was raised for the first time before the Supreme Court of New Jersey by the American Civil Liberties Union, participating as an *amicus curiae*.

The New Jersey Supreme Court declined to address this issue, noting that this issue was raised by the American Civil Liberties Union, was not previously considered by the lower courts and was thus not being presented with a sound and complete record to demonstrate the viability of this allegation (Supp. App. 13a). It is well established as a matter of state law that an *amicus* is not a party to an action but merely seeks to advise and assist the court on an issue already part of the litigation. An *amicus* must thus accept the issues previously raised by the parties and is precluded from injecting new issues not already considered. *Bethlehem Bd. of Education v. Bethlehem Education Association,* 177 *N.J. Super.* 479, 490, 427 *A.*2d 80 (App. Div. 1981); *In re Byram Tp. Bd. of Education,* 152 *N.J. Super.* 12, 18, 377 *A.*2d 745 (App. Div. 1977); *Endress v. Brookdale Community College,* 144 *N.J. Super.* 109, 123, 364 *A.*2d 1080 (App. Div. 1976). Therefore, since Airwork never raised this constitutional issue before any level of the New Jersey courts, the Supreme Court of New Jersey properly declined to address that issue as a matter of state law.

This Court has consistently recognized that federal courts should intervene in the state judicial process only to correct wrongs of a federal constitutional dimension. *Engle v. Isaac,* 457 *U.S.* 1141 (1982). In evaluating issues concerning state law, a federal court must defer to the determinations by the state courts. *Kolender v. Lawson,* 461 *U.S.* 352, 356 (1983). Particularly with regard to the views of the state's highest court concerning issues of state law, such views are binding on the federal courts. *Wainwright v. Goode,* — *U.S.* —, 78 *L.Ed.*2d 187, 192 (1983). The fact that there was a division of opinon

among the members of a state's highest court does not prevent the opinion of the majority from becoming the decision of the court and as such binding and conclusive on the federal courts. *Williams v. Eggleston,* 170 *U.S.* 304, 309 (1897). The decision by the Supreme Court of New Jersey declining to consider the issue of substantive due process in this matter on the basis that said issue was not properly before the Court was a decision of state law which should not now be subject to further review.

This Court's jurisdiction to review this case arises under 28 *U.S.C.* § 1257(3), which concerns federal rights and privileges that have been "specially set up or claimed" and upon which there has been a final decision of the state's highest court. As noted, the claim by Airwork of a substantive due process violation was never raised by it in the state courts and is thus not a proper issue before this Court. As noted in *Cardinale v. Louisiana,* 394 *U.S.* 437, 439 (1969),

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio,* 385 *U.S.* 92, 17 *L.Ed.*2d 189, 87 *S.Ct.* 252 (1966), they should be given the first opportunity to consider them.

See also *Moore v. Illinois,* 408 *U.S.* 776, 799 (1972); *Hill v. California,* 401 *U.S.* 797, 805 (1971). Therefore, the

federal constitutional issue raised in the petition should not be considered and the petition should be dismissed.

However, should this Court deem the challenge to the sales tax assessment on substantive due process grounds to be properly raised, Airwork's assertion is, nevertheless, without merit. Airwork, as the vendor of the taxable repairing service, had the statutory obligation to charge the sales tax to its customers or otherwise be directly liable therefor as a "taxpayer" to the State. *N.J.S.A.* 54:32B-14. The statute clearly provides that a vendor is to presume that "all receipts for property or services of any type mentioned in subsection (a), (b) and (c) of section 3 . . . are subject to tax until the contrary is established. . . ." Airwork, under the alleged reliance upon the question and answer concerning boat repairs appearing in CCH, ignored this standard and failed to collect the sales tax on the repair services. It is clear, however, that the CCH material contained unofficial, outdated and erroneous information. For example, the same CCH publication that contained the question and answer on the boat repairs also contained the following question and answer regarding the taxability of clothing:

> Q. Is clothing taxable?
>
> A. The sale of an item of clothing or footwear is taxable only if the price of the item exceeds $50. . . . [Resp. App. 7a, par. 3].

The original sales tax act, New Jersey Public Law 1966, chapter 30, was enacted on April 27, 1966 and exempted only the first $50 of clothing and footwear purchases. Prior to the July 1, 1966 effective date of the sales tax, the law was amended by New Jersey Public Law 1966,

chapter 51 to totally exempt from the tax the sale of clothing and footwear. CCH continued to publish the news release notwithstanding that it contained clearly outdated and erroneous information. Airwork, therefore, had no basis for reliance upon such suspect and dated information in failing to collect the sales tax relating to its repairing services.

Airwork, as the vendor of taxable repairing services generating substantial receipts, should not have relied on the CCH information and instead should have either collected the sales tax from its customers or requested specific advice from the Division of Taxation as to the taxability of these services. The Division of Taxation, in accordance with *N.J.S.A.* 52:14B-8 of the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, would have issued an advisory or declaratory ruling as to the taxability of Airwork's services had it been requested to do so.* In addition, the assessment in question did not predate the decision in *Fisher-Stevens v. Director, Div. of Tax.*, decided by the Division of Tax Appeals on August 12, 1977 (Docket No. S.T. 109), aff'd 121 *N.J. Super.* 513, 298 *A.*2d 77 (App. Div. 1972), certif. den. 62 *N.J.* 575, 303 *A.* 2d 328 (1973). *Fisher-Stevens,* involving the taxability of certain advertising services, unequivocally established

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* In addition, Airwork could have initiated a declaratory judgment action seeking clarification of the taxability of its repairing services. For example, in *Registrar and Transfer Company v. Director, Div. of Tax.*, 166 *N.J. Super.* 75, 398 *A.*2d 1335, (App. Div. 1979), certif. den. 81 *N.J.* 63, 404 *A.*2d 1162 (1979), a vendor of storage services filed a declaratory judgment action seeking a court determination as to whether the storage services were properly taxable under the Sales Tax. The purpose of the suit was to seek certainty as to the taxability of the storage services.

the taxability of such services notwithstanding that they were performed on goods destined for out-of-state delivery.

The label of "unfairness" placed by Airwork on this assessment is grounded in the contention that the assessment reflected a change in policy which was retroactively applied to transactions occurring prior to the change. Airwork cites *Central Illinois Public Service Co. v. United States,* 435 *U.S.* 21 (1978), as purportedly supporting the constitutional impropriety of the assessment. That case concerned whether an employer was liable to the Internal Revenue Service for failing to withhold federal income taxes in 1963 on lunch expense reimbursements made to its employees. The Supreme Court held that the lunch expense reimbursements did not constitute wages for withholding purposes in 1963, the employer was not responsible for withholding any taxes on such reimbursements in 1963 and the employer could not be held responsible in 1971 for such taxes. In reaching its decision, this Court stressed that in 1963 the existing judicial decisions opined that lunch expense reimbursements did not constitute taxable wages.

> Further, in 1963 and for some time thereafter all judicial decisions were the other way, even on the deductibility issue. Only with *Correll,* decided by this Court in 1967, was there a ruling of nondeductibility. And until the Court of Appeals' decision in the present case, no court had ever held lunch reimbursements to be wages for withholding purposes. [435 *U.S.* at 32].

Based on the judicial climate in 1963, this Court quite properly found that the employer had no basis for with-

holding taxes on the employees' reimbursed lunch expenses.

The holding in *Central Illinois* does not support the claim that Airwork was being retroactively subjected to the sales tax. In August of 1971, *Fisher-Stevens* left no doubt as to the taxability of Airwork's services. The record in this case does not reflect any retroactive application of the sales tax upon services. The Director of Taxation has consistently imposed the sales tax upon all taxable services performed in this State, regardless of the destination of the serviced goods. Since no contrary evidence appears in the record, Airwork has no basis for asserting that the tax in question was retroactively imposed. The Supreme Court of New Jersey made such a finding without implicating any federal constitutional principle. This issue is, therefore, bereft of any appropriate federal constitutional question reviewable by this Court.

However, even if there is a perceived federal constitutional issue involved in this case, this Court has steadfastly sustained the imposition of tax levies clearly warranted under the applicable tax law even in circumstances of retroactive application where the taxpayer may have relied to his detriment on previous administrative policy. *Dixon v. United States,* 381 *U.S.* 68, 73 (1965); *Automobile Club of Michigan v. Commission of Internal Revenue,* 353 *U.S.* 180, 183 (1957). See also *Welch v. Henry,* 305 *U.S.* 134 (1938); *Cooper v. United States,* 280 *U.S.* 409 (1930); *Bruschaber v. Union Pacific R.R. Co.,* 240 *U.S.* 1 (1916). It is clear that the legal contention proposed by Airwork is without merit and certainly does not warrant further review by this Court.

The Sales Tax statute on its face provided no exemption for taxable repairing services performed completely in New Jersey merely because the goods serviced were ultimately destined for out-of-state delivery. The assessment imposed was unequivocally consistent with the statutory standard and thereby, under the clear precedents articulated by this Court, could not be construed to deprive Airwork of due process of law.

In summary, Airwork had no basis to rely on the CCH information in failing to collect the tax, Airwork ignored the clear holding in *Fisher-Stevens* regarding the taxability of services performed in New Jersey, Airwork failed to seek clarification from the Division of Taxation as to the taxability of its repairing services in accordance with the procedures outlined in the Administrative Procedure Act, Airwork ignored the clear language of the Sales Tax that repairing services, without exception, are subject to the tax and Airwork failed to adhere to the presumption of taxability explicitly articulated in the Sales Tax. In addition, there was no regulation or official instruction issued by the Director to Airwork which established the nontaxability of the repairing services, there was no judicial opinion which reflected an inconsistent policy and there was no ambiguity in the statute. As a matter of state law, the Supreme Court of New Jersey sustained the assessment and properly declined to consider the substantive due process issue which was never raised by Airwork in the state courts.

The petition for writ of *certiorari* plainly does not raise a question of constitutional dimension which would warrant the granting of such extraordinary relief. Therefore, the petition should be denied.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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Member of the Bar of the
United States Supreme Court

DATED:

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APPENDIX

AFFIDAVIT OF VINCENT A. CARRETTA

DOCKET NO. S.T. 279-7[illegible]

TAX COURT OF NEW JERSEY

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By: Harry Haushalter
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609/292-1527

AIRWORK SERVICE DIVISION, a division of Pacific Airmotive Corporation, and a subsidiary of Purex Corporation Ltd., a California corporation,

Plaintiff,

vs.

DIRECTOR, DIVISION OF TAXATION,

Defendant

STATE OF NEW JERSEY)
COUNTY OF MERCER) SS.

Civil Action

AFFIDAVIT OF VINCENT A. CARRETTA IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

VINCENT A. CARRETTA, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am employed by the New Jersey Division of Taxation as Superintendent of Audit and am responsible

for supervising audit activity conducted by the Division of Taxation.

2. I am familiar with the assessment imposed upon the plaintiff for repair services under the New Jersey Sales and Use Tax Act, N.J.S.A. 54:32B-1 *et seq.*

3. In a revised final determination letter dated December 17, 1974, the Division of Taxation assessed $628,255.31 in sales taxes plus accrued interest against the plaintiff. Of that amount, $612,999.00 represents sales taxes imposed by the Division of Taxation upon receipts earned by the plaintiff for repair services performed in this State upon plane engines and $15,256.31 represents sales taxes imposed by the Division upon receipts earned by plaintiff for the rental of plane engines to customers.

4. The sales taxes imposed upon the rendering of the repair services were levied pursuant to N.J.S.A. 54:32B-3(b) (2) and involve receipts earned by the plaintiff for a repairing service conducted solely within New Jersey.

5. The assessment in question was imposed in accordance with the policy of the Division of Taxation of subjecting to the tax all taxable services performed within this State notwithstanding that the items serviced were delivered out of state after the rendition of the taxable service.

6. The assessment period in question includes August 12, 1971 to June 30, 1973 and commenced on the date of the decision by the Division of Tax Appeals in *Fisher-*

Stevens v. Director (S.T. 109), aff'd 121 N.J. Super. 513 (App. Div. 1972, certif. den. 62 N.J. 575 (1973)

/s/ Vincent A. Carretta

Sworn to and subscribed
before me this 14th day
of January, 1980.

/s/ Harry Haushalter
Attorney at law of New Jersey

AFFIDAVIT OF JOHN R. BALDWIN

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER COUNTY

DOCKET NO. C-1571-74

WILLIAM F. HYLAND
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Attorney for Defendant
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Trenton, New Jersey 08625

By: Harry Haushalter
Deputy Attorney General
609/292-1527

AIRWORK SERVICE DIVISION, a division of Pacific Airmotive Corporation, a California corporation and a subsidiary of Purex Corporation, Ltd., a California corporation,

Plaintiff,

vs.

DIVISION OF TAXATION,
DEPARTMENT OF THE TREASURY,
STATE OF NEW JERSEY,

Defendant.

STATE OF NEW JERSEY)
) SS.
COUNTY OF MERCER)

Civil Action

AFFIDAVIT OF JOHN R. BALDWIN

JOHN R. BALDWIN, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am presently employed as Assistant Superintendent of Collection and Enforcement in the Division of Taxation, Department of the Treasury, State of New Jersey.

2. I was formerly employed as Assistant State Supervisor of the Sales Tax Bureau of the Division of Taxation prior to the reorganization of the Division of Taxation.

Subsequent to the effective date of the New Jersey Sales and Use Tax Act, N.J.S.A. 54:32B-1 *et seq.* (April 27, 1966) and prior to the first date of applicability of the taxes imposed thereunder (July 1, 1966), I was involved in the promulgation and implementation of policy regarding the administration of said statute, and remained so involved thereafter.

4. Immediately following the effective date of the New Jersey Sales and Use Tax Act, but prior to the first date of applicability of the taxes imposed thereunder, certain representatives of the Division of Taxation drafted a proposed official news release containing questions and answers about the Sales and Use Tax Act. One proposed question and answer contained in said draft was the following:

> Q. Is the labor charge for repair work done to a boat subject to tax where: (a) The boat docks in a port outside New Jersey for repairs; (b) In connection with such repairs, parts are transferred from the boat to a repair shop located in New Jersey; (c) Pursuant to a contract, upon completion of the repair work the parts are delivered back to the boat outside New Jersey?
>
> A. No. Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser out-

side the State for use outside the State are exempt from the sales tax. Under the facts set forth above, the labor charge would not be subject to the sales tax.

5. The draft of the proposed official news release was modified and the specific question and answer appearing in paragraph 4 above was deleted. Attached to this affidavit as Exhibit C is a copy of the official news release that was published in June of 1966.

6. The draft of the proposed news release was published by Commerce Clearing House and presently appears in Volume 1 of the New Jersey State Tax Reporter at pp. 6371-6383. The specific citation noted in paragraph 4 above is cited at p. 6380.

7. Since the proposed draft of the official news release containing the noted question and answer was never officially published, said material was neither officially released for publication to Commerce Clearing House nor was it ever filed with the Office of the New Jersey Secretary of State.

9. To the best of my knowledge, the policy of the Division of Taxation since the inception of the Sales and Use Tax Act in July of 1966 has been to tax all services subject to the sales tax performed within the State regardless of whether the products upon which such services are performed are shipped out of the State subsequent to the performance of the taxable service.

/s/ John R. Baldwin

Sworn to and Subscribed
before me this 28th day
of January, 1975.

/s/

Notary Public of New Jersey
My Commission Expires Jan. 5, 1976

(SEAL)

STATE OF NEW JERSEY
OFFICIAL NEWS RELEASE
Office of the State Treasurer
Statehouse, Trenton, N.J.

Phones: 292-5031, 292-5032 or 292-5119

For Release At Will

WHAT NEW JERSEY'S SALES AND USE TAX MEANS TO YOU . . . THE CONSUMER

1. Q. Must the sales tax be paid on purchases *completely delivered* before July 1, 1966 but partially paid for after July 1, 1966?

   A. No. There is no tax where the goods were completely delivered before July 1, 1966.

2. Q. Is there a tax on the sale of goods *completely paid for* before July 1, 1966, but delivered after July 1, 1966?

   A. No. There is no tax where complete payment is made before July 1, 1966.

3. Q. Is clothing taxable?

   A. The sale of an item of clothing or footwear is taxable only if the price of the item exceeds $50. Accessories such as jewelry, handbags, and umbrellas, however, are taxable, regardless of price.

4. Q. If a sport coat is purchased for $40 and a hat for $15, is there a tax?

   A. No, because the sale price of each item is under $50.

5. Q. If a suit is purchased for $55 and a hat for $15, is there a tax?

   A. The tax is payable on the $55 suit which is considered a single item of clothing. There is no tax

on the sale of the hat because the sale price is under $50.

6. Q. Is the fuel used in heating my residence taxable?

   A. No. Purchase of all fuel is tax exempt.

7. Q. I rent my living quarters. Will the rent I pay to the landlord be taxable?

   A. No. The sales tax is not imposed on the rental of any real property, except hotel or motel rooms occupied for 90 days or less where the charge is more than $2 a day.

8. Q. Is the purchase of a home taxable?

   A. No. The sales tax does not apply to the sale either of new or old real property no matter whether it is residential, business or industrial.

9. Q. Would the purchase of furnishings for a home be taxable?

   A. Yes. Any purchase of tangible personal property is subject to the sales tax, unless specifically exempted.

10. Q. Will the sales tax apply to the materials purchased by contractors and repairmen for use in building homes and other private structures?

    A. Yes. Sales to contractors and repairmen for use by them in erecting private structures for others or improving, altering or repairing real property of others are deemed to be retail sales and therefore taxable.

11. Q. Will groceries, meat, vegetables or dairy products be taxed?

    A. No. Most food for human consumption at home is not taxable. However, candy, confectionary, soft drinks, certain fruit drinks and liquor and wine for off-premises consumption are taxable. Restaurant meals are also taxable.

12. Q. Are admissions to skating rinks, beaches and swimming pools taxable?

A. No. Charges for admission to or the use of facilities for sporting activities where the patron is a participant are not subject to the tax.

13. Q. Would the rental of shoes at a bowling alley, or beach umbrellas at a beach or pool be taxable?

A. Yes. These items are taxable as tangible personal property, notwithstanding their use for participant sports.

14. Q. Are automobile repairs taxable?

A. Yes. The tax is payable both on parts and labor. Most other types of services to automobiles are also subject to tax, such as lubrication, battery charging, towing, washing and waxing.

15. Q. What restaurant meals are taxable?

A. A tax is imposed on restaurant meals and drink, except alcoholic beverages.

16. Q. Are meals taxable to those attending functions of non-profit organizations, such as religious or educational conventions?

A. No. An exemption is provided for meals paid for or sold directly by organizations when these meals are furnished at organization affairs.

17. Q. Are utility bills taxable?

A. No. Consumers; utility services, including telephone and telegraph gas, water, electricity, steam, refrigeration services and fuel are exempt.

18. Q. Would the lease or rental of a car, truck, trailer, boat, garden tools or building tools be taxable?

A. Yes. The rental or lease of any tangible personal property is taxable, unless specifically exempted.

19. Q. Would the purchase of textbooks from a college book store be taxable?

A. No. Textbooks for student use are exempt. However, sales of other items sold in shops or stores operated by charitable, religious, or educational non-profit organizations are subject to tax.

20. Q. If a resident of New Jersey buys a movie camera outside New Jersey and brings it into the State, must he pay a tax?

A. Yes, if the out-of-state vendor does not collect the New Jersey sales tax, the buyer must pay the use tax directly to the New Jersey Sales Tax Bureau. (Where a sales tax has also been paid to another state or locality in that state, inquiry should be made as to whether credit can be claimed for the tax paid the other state or locality in that state.)

21. Q. If a resident of another state bought an automobile in this State, is the sale taxable?

A. No. Sales of motor vehicles to a non-resident who has no permanent place of abode in New Jersey are not subject to the sales tax, even if delivered in this State, provided the motor vehicle will not be used in carrying on any business, employment or profession in this State. Purchases of all other tangible personal property by non-residents are taxable if delivered here, but exempt if delivered outside the State.

22. Q. Will a tax be payable on the purchase of a newspaper, magazine or periodical?

A. No. These purchases are specifically exempt.

23. Q. If a person buys his own textile material and accessories and has a tailor make them into a suit, are the tailor's services subject to tax?

A. Yes. The production of tangible personal property such as a suit is taxable. However, tailoring

which involves the repairing or mending of tangible property is exempt.

24. Q. Is a charge for radio or television repairs subject to tax?

A. Yes. This constitutes a repair to tangible personal property and both the charges for the parts and labor are subject to tax.

25. Q. Are cosmetics and cosmetic supplies taxable?

A. Yes.

26. Q. Is the purchase of medicine or drugs by prescription taxable?

A. No. Prescription drugs and prescription medicines for the cure, relief, treatment or prevention of illness or disease in humans are exempt from the tax. Non-prescription drugs or medicines, such as aspirin, are taxable. Drugs and medicines with or without prescriptions for animals are taxable.

27. Q. Is a sales tax payable on the development of home movies, photographic films and prints?

A. Yes. Services performed on tangible personal property not held for resale are taxable.

28. Q. Is there a tax on "room service" meals charged by a hotel?

A. Yes. The additional charge is considered part of the cost of the meal and, therefore, taxable.

29. Q. Are dietary foods and health supplements subject to the sales tax?

A. No. These items are exempt.

30. Q. Are such things as artificial limbs, dentures and prescription glasses taxable?

A. No. These prosthetic aids are exempt from the tax.

31. Q. Are auto parking lot charges subject to tax?

    A. No.

32. Q. What types of services to tangible personal property are taxable?

    A. In general, the sales tax applies to the cost of installing tangible personal property when it is not incorporated into real property so that it represents a capital improvement. It also applies to maintaining, servicing and repairing tangible personal property not held for resale in the ordinary course of business.

33. Q. If a repair is made to my home, on what must a tax be paid?

    A. The tax is on the total charge, including both labor and materials.

34. Q. Are charges for lawn-mowing and snow removal services subject to the tax?

    A. Services of this kind are not subject to tax unless performed by someone who is in a regular trade or business offering these services to the public.

35. Q. Is a charge by a tree service company for pruning trees subject to tax?

    A. Yes. Servicing real property is taxable.

36. Q. If a home owner has his house painted or his lawn mowed by a person who does this kind of work only occasionally, does he pay a tax on the amount paid?

    A. No. This is a service rendered by a person who is not in a regular trade or business offering his services to the public.

37. Q. In the above illustration, is there a tax on the paint purchased?

    A. Yes. The purchase of the paint represents a retail sale of tangible property.

38. Q. If a home-owner has his grounds cared for by a commercial gardener, are the services taxable?

A. Yes. Services rendered by an individual who is in a regular trade or business offering his services to the public are taxable.

39. Q. Would the installation of a new heating system in a private home be taxable?

A. No. There is no tax *on the cost of installing* property which becomes a capital improvement to real property. However, the tax does apply to the materials used in the installation.

40. Q. Is a charge for removing the stucco exterior of an older house and installing aluminum siding in its place subject to tax?

A. No, since this constitutes a capital improvement to real property rather than a repair. However, the tax does apply to the aluminum siding.

41. Q. If a home-owner has some broken windows replaced by a glazier or bathroom fixtures repaired by a plumber, are these costs taxable?

A. Yes. The tax would apply to the total charge, including both labor and materials.

42. Q. Is the cost of a window-cleaning service taxable?

A. Yes.

43. Q. Is a roofer's charge for replacing shingles, blown off during a windstorm, subject to tax?

A. Yes. This would be taxable as a repair to real property, unless the work was extensive enough to consider it a capital improvement.

44. Q. If a home-owner has a porch added to his home, is the total cost of this improvement taxable?

A. No. This represents a capital improvement and as such only the cost of material is taxable.

45. Q. Is the service provided by a stock broker in the purchase and sale of securities taxable?

A. No. Financial, management and consulting services rendered to an individual are not taxable.

46. Q. Are services rendered by the trust department of a bank in the management of one's estate taxable?

A. No. Personalized management and consultant services are not taxable.

47. Q. Are the charges for landscaping services taxable for both labor and materials?

A. Yes—except where it becomes a capital improvement. When a capital improvement is made, the materials are taxable but no tax is due on the service rendered.

48. Q. Are services rendered by exterminators taxable?

A. Yes. This is one of the taxable services to tangible personal or real property.

49. Q. Are alterations and repairs to wearing apparel subject to tax?

A. Alterations and repairs are exempt, except alterations to new clothing.

50. Q. Are laundry and dry cleaning services subject to tax?

A. No. Laundering and dry cleaning services are exempt.

51. Q. Are laundering and dry cleaning services performed by coin-operated machines taxable?

A. No. Laundry and dry cleaning services are exempt regardless of the method used.

52. Q. Are charges for boarding dogs, cats, or other pets subject to tax?

A. Yes. In addition, other services to pets and animals, such as grooming and clipping, are taxable. So are sales of pet foods, even though bought in a grocery store.

53. Q. Is the storage of personal and household effects subject to tax?

A. Yes. The storage of all tangible personal property not held for sale in the regular course of business is taxable.

54. Q. Are moving and storage charges subject to tax?

A. Storage of tangible personal property is taxable, but moving (transporting) property is not taxable if the transportation cost is separately charged.

55. Q. Is the rental of a safe deposit box taxable?

A. Yes. The rental of a safe deposit box or similar place is taxable.

56. Q. Where the sale of food is not stated separately but is included in a single charge which also covers lodging—as in an American plan hotel—is the total amount taxable?

A. Yes. However, if the purchaser is exempt from the hotel room occupancy tax because he is a permanent resident, the portion of the charge allocable to lodging is not taxed.

57. Q. Are loans received from a finance company taxable?

A. No. Financial services are not taxable.

58. Q. Are premiums paid on insurance policies taxable?

A. No. Insurance premiums and annuity considerations are not taxable.

59. Q. Which organizations are exempt?

A. Exempt organizations include: (a) The United States government and its agencies; (b) The

United Nations or any international organization of which the United States is a member; (c) The State of New Jersey and its agencies and instrumentalities; and (d) Non-profit organizations operated solely for religious, charitable, scientific, literary, educational purposes, for the prevention of cruelty to children or animals, or testing for public safety.

However, if any of these organizations sells goods or services in a shop or store and such goods or services are normally sold commercially, except for textbooks, then the exempt organization must collect the sales tax from its customers.

60. Q. When does the sales tax apply to hotel and motel rooms?

A. The tax applies to transient occupancy if the charge is more than $2 per night.

61. Q. Is there a tax on hotel or motel rooms occupied as a permanent residence?

A. No. If the hotel or motel rooms are occupied for at least 90 consecutive days, there is no tax.

62. Q. The YWCA rents rooms at rates of $3 per day and up. Is the rental income from these rooms taxable?

A. No. Any non-profit charitable, religious or educational organization that operates a hotel, or offers rooms for rent, is not subject to the tax if it carries on its other activities in that building.

63. Q. If the hotel lists separately the charges for room rental and the charges for certain services such as the use of equipment, maid service, towel and linen service, elevator service, etc., how much of the total is subject to tax?

A. The total amount is taxable since charges for furnishings and accommodations accompanying the use of the room constitute rent.

64. Q. Are admissions to stock car races taxable?

A. Yes—if the charge is in excess of 75¢.

65. Q. Are admissions to high school basketball games taxable?

A. No. Admissions to elementary and high school athletic games are exempt if the proceeds go to the school.

66. Q. Are admissions to or charges for use of skiing facilities taxable?

A. No. Charges for admissions to sporting activities in which the patron is a participant are exempt from sales tax. This would include such sports as bowling, swimming, roller skating and ice skating.

67. Q. Are admissions to a dance sponsored by a church taxable?

A. No. Most admissions charged for non-athletic events by non-profit groups are exempt from sales tax.

68. Q. Are admissions to college athletic events taxable?

A. Yes. No exemption is provided for athletic event admissions of non-profit groups except those of elementary and high school groups.

69. Q. Are admissions paid for a ride on a ferris wheel taxable?

A. Yes—if the charge exceeds 75¢

70. Q. Are admission charges in excess of 75¢ to horse races taxable?

A. Yes. Admissions to certain sporting events, such as, horse racing, football and basketball are subject to the sales tax.

71. Q. Are charges for delivery services taxable?

A. No. Charges for transportation of property from the vendor to the consumer are not taxable where the charge is separately stated in the written contract, if any, and any bill rendered to the purchaser.

72. Q. Is there a tax on haircuts and beauty parlor services?

A. No. All services upon the person of an individual are not taxable. This includes, among other services, massage, manicuring and reducing treatments. Materials or supplies purchased in connection with such services usually are taxable.

73. Q. Are the fees charged by an employment agency taxable?

A. No.

(p. 1)

DIVISION OF TAX APPEALS
DEPARTMENT OF THE TREASURY
STATE OF NEW JERSEY

DOCKET NO. S.T. 279-75

AIRWORK SERVICE DIVISION, a Division of Pacific Airmotive Corporation, a California corporation, and a subsidiary of Purex Corporation, Ltd., a California Corporation,

Petitioner,

vs.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

Depcsitions Upon Oral Examination of:

JOHN R. BALDWIN

TRANSCRIPT of the deposition of JOHN R. BALDWIN, witness in the above-entitled matter, called for Oral Examination pursuant to the Rules of Civil Practice and Procedure, Notice to Take Depositions and Stipulation and Agreement entered into by and between counsel for the respective parties, said deposition being taken by and before PATRICIA J. KEARNS, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, at the offices of WHARTON, STEWART & DAVIS, ESQS., 50 West Main Street, Somerville, New

Jersey, on Tuesday, November 1, 1977, commencing at approximately ten o'clock in the forenoon.

(p. 1A) APPEARANCES:

PITNEY, HARDIN & KIPP, ESQS.,

BY: JAMES F. KEEGAN, ESQ., and
GERALD G. NEARY, ESQ.,
Attorneys for the Petitioner.

HARRY HAUSHALTER, ESQ.,
DEPUTY ATTORNEY GENERAL
Attorney for the Respondent.

(p. 2) INDEX

WITNESS:		*DIRECT*
JOHN R. BALDWIN,		
By Mr. Keegan		3

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(p. 3) JOHN R. BALDWIN, having been duly sworn according to law by the officer, testified as follows:

DIRECT EXAMINATION

BY MR. KEEGAN:

Q. State your home address for the record.

A. 72 Mountainview Road, West Trenton, New Jersey.

Q. Mr. Baldwin, my name is James Keegan. I am an attorney from Pitney, Hardin and Kipp. We represent Airwork in the pending proceeding before the Division of Taxation Appeals, and we are here to take your deposition today.

Have you ever been deposed?

A. Yes, I have.

Q. Are you familiar with the procedures and the way the deposition is handled?

A. Well—

Q. I'm going to ask you a number of questions. If you don't understand a question, please say so. If you would like me to rephrase it or try to approach it a different way, tell me. Mr. Haushalter might want to interject an objection on the record, so please allow him an opportunity to do that before you answer it.

What is your present position with the Division of Taxation?

* * * * *

(p. 97) happened? A. I don't recall any mention. Often times in a conversation of that nature, somebody might refer to some other matter, you know, that might have been litigated or it might have been a full-blown hearing on it; or there might have been an agent's opinion on it or any number of things. They might refer to another matter. I don't have any recollection of anybody raising another specific case and, you know—

Q. Do you know if the Division has ever published to the public a statement of the policy referred to in paragraph nine of your affidavit?

A. Not in specific terms, no. At least I don't know of any, okay? I think, inferentially, that implies that policy.

For example, we refer to services performed outside of New Jersey as a category of exempt gross receipts. We do this in our instructions for the preparation of the return. Now, inferentially, I think, you could draw a conclusion that we are saying that services which the tax is imposed upon—we begin with "When performed in New Jersey,"—are subject to tax regardless of where the property on which the services are performed or delivered. Now, granted, that every citizen might not be able to draw that inference, but certainly it would be enough to raise a question in the mind of somebody (p. 98) who was preparing that return.

Q. Now, if I understand your testimony, you are saying if someone reviewed the Division's statements of policy concerning the taxability, sales taxability of services performed outside the State of New Jersey would

draw the conclusion, inferentially, that service performed in the State of New Jersey were taxable is that correct?

A. I certainly read it that way or at least there would be enough of a doubt raised to specifically pursue the question.

Q. Where would they find those publications concerning the services?

A. They get one in the mail every three months.

Q. Concerning the taxability of services performed outside the State of New Jersey?

A. I think I testified this morning that that appears in the instructions for the completion of the sales tax return.

Q. Are there any—

A. It did then and does now.

Q. Are there any policies to that effect for services performed outside the State of New Jersey which appear in any of the news releases or in CCH or Prentice Hall?

(p. 99) A. Well, I can't speak to what appears in CCH and Prentice Hall unless your question is specific.

Q. Would you take the Prentice Hall and if there are any in there review them quickly and tell me if you can if there is a statement of policy concerning the taxability of services performed outside the State of New Jersey?

A. Let me see if I understand this. You want me to review this whole section?

Q. No.

MR. KEENAN: Excuse me for one second.

Off the record.

(Discussion held off the record.)

A. What are you looking for?

Q. Directing your attention to CCH, Volume 1, page 6187-3, I believe in the bottom right-hand side of the page. Are those the instructions you just referred to in your testimony?

A. May I see those? Well, this is a later version of the same thing. The one in CCH is a revision dated 6/70, and the one I have in my hand, the actual instructions are dated 5/67.

Q. And the instructions which you refer to in your testimony—

A. Well, to the extent that that item is on the worksheet. Services performed out of New Jersey (p. 100) is in the deductions' worksheet in both instances.

Q. And what are the instructions you referred to in which you said the taxpayer could draw the inference that they were taxable?

A. Well, the simple statement that we have a deduction item for service performed out of New Jersey raises a question in, you know, in my opinion, that any prudent man would say, "Wait a minute, the inference of that is that if I perform taxable services in New Jersey that the tax applies."

Q. That would put him on notice that he should check further into that?

A. In my mind—I am not addressing the question whether the court will see it that way—what I am saying is that in my mind someone responsible for a tax affair of a major corporation would certainly be troubled by that.

Q. This document which you produced, the instructions, the ST-50A form, 5-67 was the one in use in 1967?

A. The ST-50A, yes.

Q. Do you know if that version of the form was published in CCH?

A. At that time?

Q. Yes.

A. I do not. I would assume that it was. That document was filed in the Secretary of the State's Office which is significant in that it gives the force and effect of a regulation.